JUDICIAL DECISIONS ON PUBLIC LAW

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Advisory Referendum for Instructing Constitutional Convention—Power of Court of Equity to Enjoin. Payne v. Emmerson (Illinois, December 17, 1919, 125 N. E. 329). This was a taxpayer's action seeking to enjoin the submission to the voters of Illinois of three questions in accordance with the provisions of the so-called Public Opinion Act of 1901. The three propositions were all in the form of instructions for the guidance of the members of the constitutional convention of Illinois which was shortly to assemble. Two of the proposals related to the initiative and referendum and one to the problem of public ownership of public utilities. The submission of these propositions was attacked on the ground that the questions were not questions of public policy within the meaning of the Public Opinion Act, which contemplated the reference to the people only of questions relating to legislative policy and not matters respecting constitutional changes. It was also contended that it was a constitutional right of the citizens to have the delegates to the constitutional convention unfettered by any instructions from the people and entirely free to exercise their own best judgment upon the questions they were called upon to consider.

The court did not discuss these contentions upon their merits but held that the case did not present an opportunity for relief in equity. A court of equity can intervene to protect civil rights but not political rights. The right, if any, which is endangered by the referendum complained of is political in character. Elections are not matters with which a court of equity can interfere without manifest danger to the liberties of the people, and the actual financial loss arising from the cost of such election which any one taxpayer would suffer is insufficient to warrant the issuance of an injunction for its protection.

Display of Flag of Organization Advocating Principles Antagonistic to Existing Government, Laws, or Constitution. Ex parte Hartman (California, March 13, 1920, 188 Pac. 548). An ordinance of the city

of Los Angeles made it a penal offense for any person to display publicly or privately, or to have in possession, any flag or insignia of any kind of any nation, sovereignty, society or organization espousing for the government of the people of the United States principles or theories of government antagonistic to the Constitution and laws of the United States, or to the form of government thereof now existing. This ordinance the court held to be unconstitutional as violating the "rights guaranteed . . . . by the Constitution of this country," although those rights are not specifically enumerated. It is pointed out that the ordinance is couched in language broad enough to forbid the display of the flag or emblem of organizations peaceably urging the adoption of amendments to the federal or state constitutions even though such proposals are innocent and harmless. In a sense any political change may be regarded as antagonistic to the existing order of government and to punish the peaceful and orderly espousal of such change goes beyond the constitutional authority of the city.

Eminent Domain—Meaning of "Public Use"—Exclusion of Apartment Houses from Residence Districts. State v. Houghton (Minnesota, October 24, 1919, 174 N. W. 885; same, Minnesota, January 23, 1920, 176 N. W. 159). These cases present an interesting judicial debate upon the question whether by use of the power of eminent domain and the payment of compensation apartment houses may lawfully be excluded from residence districts in cities. By an act of 1915 the legislature of Minnesota authorized cities of the first class to establish residence districts upon the petition of fifty per cent of the property owners in the district sought to be affected, and to exclude from such residence districts a long and varied list of industrial and mercantile establishments together with "apartment houses, tenement houses, flat buildings." The cities were authorized to effect the exclusion of these undesirable buildings or establishments by means of eminent domain and the payment of compensation. The compensation was to be paid out of assessments upon the property of the residents of the districts thus benefited. In this case a mandamus was asked to compel the building inspector of Minneapolis to issue a permit for an apartment in one of these restricted districts.

On the original hearing the court held that this statute and the ordinance of the city council of Minneapolis passed in pursuance of it provided for an unconstitutional use of the power of eminent domain. The majority opinion, written by Judge Dibell, narrowed the issue of

the case to the question whether the condemnation of property rights provided for was for a "public use" or not, inasmuch as it is well established that private property may be taken only for a public use. It was pointed out that the property condemned under these enactments, property in the nature of an easement or restricted use, was not property of which the public could make any actual use. The public gained by such condemnation no right to enter upon or use the property affected. The "use" acquired was merely negative in character. The court further declared that the "public use" for which the property was being taken was public only in the sense that it worked to the advantage and benefit of the surrounding property owners who desired protection from the erection of ugly or inappropriate structures. If the desire or need for protection of this kind is to be regarded as constituting a "public use" for which private property may be taken by right of eminent domain the limits of the doctrine are hard to fix and much injustice may result. "When the humble home is threatened by legislation upon aesthetic grounds, or at the instance of a particular class of citizens who would rid themselves of its presence as not suited in architecture or in other respects to their own more elaborate structures, a step will have been taken inevitably to cause discontent with the government as one controlled by class distinction, rather than in the interests and for the equal protection of all." There is, of course, no question of the police power raised in this case. In fact the supreme court of Minnesota had in an earlier decision held that apartment houses could not be excluded from residence districts by a mere exercise of the police power since there was nothing in their character to justify the conclusion that they could properly be classed as nuisances (State v. Houghton, 134 Minn. 226, 158 N. W. 1017).

Two justices dissented from the decision of the majority in this case and filed a brief opinion in which they laid emphasis upon the undesirable results of allowing apartment houses to invade residence districts without restraint and expressed the view that "it is about time that courts recognize the aesthetic as a factor in the affairs of life," and that aesthetic protection is a proper field of legislative control. On a rehearing of the case the dissenting justices won a majority of the court to their point of view, the decision just discussed was reversed, and the statute and ordinance in question were held constitutional. The opinion of Judge Holt admitted that the public received no actual, physical use of the property taken by eminent domain, and that only a portion of the public could reasonably be said to be benefited by the taking. His opinion is in effect a vigorous protest against a narrow and in-

elastic definition of the term "public use" in the law of eminent domain. The meaning of "public use" must expand with time and the needs of society and purposes which are intimately connected with the welfare of the community or a substantial portion of it may legitimately be furthered by the condemnation of private property rights. Apartment houses are a menace to the welfare of people living in residence districts. They destroy the beauty of the neighborhood and bring about depreciation in the value of surrounding property. This results in loss to the owners of the property affected and loss to the city in the form of diminished taxable values. "Giving the people a means to secure for that portion of a city wherein they establish their homes, fit and harmonious surroundings, promotes contentment, induces further efforts to enhance the appearance and value of the home, fosters civic pride, and thus tends to produce a better type of citizens." It is the conclusion of the court that property condemned for such purposes is condemned for a public use.

It will be observed that the clash of opinion in these two cases presents an issue by no means new. There have long been two distinct interpretations applied to the term "public use" in the law of eminent domain. One of these would make "public use" synonymous with "use by the public" and thereby limit the taking of private property to the cases in which the public actually acquires title and possession. The opinion of the majority in the first case examined approximates this point of view. This doctrine has the very obvious advantage of providing an explicit and unvarying test by which courts may determine whether or not the use for which property is being condemned is public or private. It is doubtless this definiteness which has commended it to the approval of an overwhelming majority of courts and commentators (Lewis, Eminent Domain, Secs. 257–258). The opposing view is that "public use" in eminent domain should be construed to mean "public welfare" and that any taking of private property which can be justified upon this broad ground may be sustained. It is this doctrine upon which Judge Holt bases his opinion in the second case. While it commands the adherence of only a small minority of the courts which have passed upon it, strong pressure is being exerted in its behalf. The adoption of this more liberal doctrine of public use seems necessary if the condemnation of various types of easements, or excess condemnation, are to be employed in the working out of city planning programs and it seems probable that its acceptance will tend to spread in spite of the dangers which are undoubtedly connected with it.

Freedom of Speech—Power of States to Prohibit Disloyal Language During War. Ex parte Meckel (Texas, Court of Criminal Appeals, May 21, 1919, on motion for rehearing March 19, 1920, 220 S. W. 81). The legislature of Texas passed a Disloyalty Act making it a felony for any person to utter in the presence of any other person language disloyal to the United States in time of war, or language which, if uttered in the presence of an American citizen, would be reasonably calculated to provoke a breach of the peace. Meckel was convicted under the act and on petition for a writ of habeas corpus urged that the act was unconstitutional because it violated the guarantee of freedom of speech found in the constitution of Texas, and because it was an attempt on the part of the state to exercise war power which belonged exclusively to Congress. The court of criminal appeals construed the act as one designed to prevent breaches of the peace which might occur if disloyal language were uttered in the presence of American citizens. Viewed in this light the court found no difficulty in upholding the statute as a legitimate exercise of the police power of the state. It suggested, however, that if the act were interpreted as creating an offense other than that of provoking breaches of the peace there would be grave doubts as to its constitutionality.

On motion for rehearing the court adopted a different view of the meaning and intent of the statute. This new construction was urged by the state. Under it the act would provide, as paraphrased by the court, "If any person in time of war, in the presence and hearing of another person . . . . use any language . . . . which language . . . . is of such a nature as that in case it is said in the presence and hearing of a citizen of the United States, it is reasonably calculated to provoke a breach of the peace, such person shall be guilty of a felony." So construed the court held the statute unconstitutional upon two grounds. In the first place, it abridged freedom of speech as guaranteed by the bill of rights of the state constitution because it penalized the utterance of disloyal language even when such language was spoken under circumstances which would not tend to produce a breach of the peace, namely in the presence of persons who were not American citizens. The power of the state to curb freedom of expression is limited to such measures as will prevent breaches of the peace and does not extend to the penalizing of language which is disloyal per se. In the second place, the punishment of persons who speak disloyally during time of war but do not incite breaches of the peace is the function of the federal government exclusively.

"The prohibition of the use of disloyal language per se as a war measure, is admittedly the subject of federal legislation, and not within the purview of the regulatory power of the states."

This decision seems to be unique. It is the first case apparently in which a statute punishing disloyal utterances during time of war has been held to invade the freedom of speech guaranteed by constitutional provision. In holding that the state may not legislate is such a manner as to aid the federal government in the exercise of the war power the opinion in this case is in conflict with the decisions of the courts of Minnesota[1] and New Jersey.[2] In each of these cases it was held that the state could aid in the prosecution of the war, provided only that the state laws enacted for that purpose did not conflict with congressional legislation upon the same subject. This seems to be the correct rule, not only with reference to the war power of Congress but also with respect to other spheres of federal authority, and it is doubtful if the doctrine of the Texas court of criminal appeals in this case will meet with approval upon this point.

Involuntary Servitude—Liability to Master of One Hiring Servant Who Breaks Contract of Employment. Shaw v. Fisher (South Carolina, February 23, 1920, 102 S. E. 325). This was an action for damages brought against the defendant for enticing away from the plaintiff a servant who had contracted with him to work as a share cropper for a period of one year. The defendant employed this servant after having notice that he was under contract to the plaintiff. The court decided that the defendant's conduct in the matter was not actionable. While the common law recognized a right of action in such a case the Thirteenth Amendment to the federal constitution abolished any such common law doctrine. The validity of a statute or rule of law must be determined by its operation and effect. To allow the plaintiff to recover damages from any one who employed a servant who broke a contract of employment with the plaintiff would in effect compel the servant to remain against his wishes in the employ of the plaintiff since it would make it impossible for him to secure work elsewhere. The servant has the right at any time to break his contract of service and be subject only to liability for damages. Any pressure direct or indirect which deprives him of this right must fall within the prohibition against involuntary servitude.

[1] State v. Holm, 166 N.W. 181, see *American Political Science Review*, May, 1918, p. 286.

[2] State v. Tachin, 106 Atl. 145, *idem*, August, 1919, p. 498.

Police Power—Power of State to Regulate Ordinary Mercantile Prices. A. M. Holter Hardware Co. v. Boyle (United States District Court, Montana, January 13, 1920, 263 Fed. 134). The legislature of Montana enacted a statute creating a trade commission and giving it power to regulate business and to "establish maximum prices or a reasonable margin of profit" in respect to all commodities. Action was instituted in this case to restrain the enforcement of this law. The United States district court held the act void as a deprivation of property without due process of law. It has long been established that the power of government to regulate prices extends only to businesses which are affected with a public interest and not to the sale or production of the ordinary commodities of commerce. While the list of businesses which are thus affected with a public interest has expanded with the passage of time, the courts of this country from the Supreme Court down have adhered to the doctrine that the element of public interest must always be present to justify the control of prices. The business must be one "wherein its proper conduct concerns more than the parties to any single transaction, wherein by reason of peculiar circumstances the business sustains such relation to the public that they are affected by its consequences." This element of public interest is entirely lacking in the forms of business which the statute seeks to subject to control. The act therefore interferes unreasonably with private property rights, with individual freedom of contract, and accordingly amounts to a deprivation of property without due process of law.

Primary Election—Right of a Democrat to Become a Candidate for Republican State Committeeman. German v. Sauter (Maryland, February 18, 1920, 109 Atl. 571). This case is instructive as showing the pitfalls which lie in wait for the careless legislator. The general laws of Maryland relating to primary elections provide that it shall be the duty of the supervisors of elections to print on the official ballots the names of all candidates for public offices or for offices or committee membership in political parties, provided that each candidate pays such fees as may be required and files a certificate setting forth his residence, the name of the office for which he is a candidate and the party to which he belongs. The law does not require that a candidate for nomination at the hands of a particular political party need be a member of that party. The court held in this case that they had no authority to add to the requirements or qualifications for nomination

set forth in the law and that therefore Sauter, who was an affiliated Democrat and who was consequently under the law unable to cast a vote in a Republican primary, could compel the supervisors of elections to place his name on the ballot as a candidate for Republican state committeeman.

Referendum—Applicability of Emergency Clause Provision to Acts Passed by Special Session of Legislature. State v. Olson (North Dakota, January 16, 1920, 176 N. W. 528). A special session of the legislature of North Dakota convened in November 1919 and passed a substantial number of acts designed to reduce the authority of several of the executive officers of the state who had been involved in a political disagreement with the governor. At the close of the session the legislature passed an act providing that all acts passed at any special legislative session should go into effect within ten days of the date of enactment unless the legislature by a vote of two thirds shall declare them to be emergency measures in which case they shall be effective immediately. The constitution of North Dakota provides that the acts of the legislature shall not go into effect until the first day of July following the close of the session unless the act shall by a two-thirds vote of the assembly be declared an emergency measure. During the period in which they are thus suspended the acts of the legislature are subject to referendum by the people upon the filing of a petition in accordance with the provisions set forth in the constitution. Thirty-nine of the acts passed by the special session of 1919 were passed by less than the majority of two-thirds requisite to make them emergency acts and petitions calling for their referendum to the people were promptly filed. The question whether these acts were constitutionally subject to referendum is the point involved in this case.

It was urged upon the court that the constitutional provisions respecting emergency legislation were not applicable to special sessions of the legislature but only to the regular sessions, and that therefore the special session had the power to put its enactments into operation without delay irrespective of the constitutional clauses above mentioned. This view was supported by the argument that to suspend the operation of statutes passed by a special session until the first of the following July would mean in some cases a suspension of practically a year and produce a situation which could not have been within the contemplation of the framers of the constitutional provisions in question. The court found itself unable to agree with this point of view.

It declared that the constitution recognized no difference in powers or duties between a regular and a special legislative session and that there was no basis upon which to rest the view that special legislative sessions should be exempted from the application of the clause relating to the passing of emergency measures. The act providing that the laws passed by the special session should become operative within ten days after enactment was accordingly unconstitutional, and the acts which had not been declared by the requisite two-thirds majority to be emergency measures were subject to referendum in the usual manner.

Suffrage—Extension to Women in Primary Elections by Legislative Act. Hamilton v. Davis (Texas, Court of Civil Appeals, December 13, 1919, 217 S. W. 431). A statute of 1918 granted to female citizens who have all the qualifications of electors except that of sex the right to vote in primary elections. The appellant was a candidate for nomination for the state legislature and sought an injunction restraining the enforcement of the act on the alleged ground of its unconstitutionality. His contention was that the word "election" as used in section 2, article 6 of the Texas constitution defining the qualifications of voters includes primary elections. The court rejected this view and upheld the validity of the law. While previous decisions had held that primary elections were within the meaning of the constitutional provisions giving the courts jurisdiction in cases of contested elections, the court declared that it was unnecessary to attach the same meaning to the word election wherever it was used. It should be construed in the light of the purpose of the provision in which it was used. While it should be interpreted broadly in the clause relating to contested elections so that the remedial purpose of that provision might have the fullest possible effect, it should be construed strictly when used in the clause defining the qualifications of voters so as not to "thwart the effort of the legislature to extend a valuable privilege to a worthy class of citizens." The correctness of this construction is further emphasized by the fact that state legislatures have frequently established different qualifications for voting in primary elections from those which apply in general elections. It is common for primary statutes to require test oaths of party allegiance as a condition of voting in the primary, although the requirement of such oaths would be clearly unconstitutional if applied to regular elections. If a legislature may enact that only members of political parties shall participate in primary elections it may with equal propriety extend that privilege to women.

Taxation—Public Purpose—Reclamation of Waste Lands for Homestead Purposes. State v. Clausen (Washington, March 30, 1920, 188 Pac. 538). An act of the legislature of Washington passed in 1919 authorized the creation of a state reclamation board endowed with very wide powers. This board was authorized to acquire for the state private property suitable for farms and farm laborers' allotments, to make such improvements as might be necessary to render the land habitable, to allot it to applicants either by lease or sale in accordance with restrictions set forth in the statute. In the allotment of these homesteads soldiers were to be given preference. This case hinged upon the question whether the expenditure of the money of the state for such a purpose was constitutional in view of the well established rule that taxes may be levied only for a public purpose. It was alleged that the expenditures provided for were for the benefit of private individuals and were not for a public purpose.

The court held that the purpose for which the proposed expenditures were to be made must be regarded as public. It comments at length upon the difficulty of drawing a distinct line between public purpose and private purpose in taxation, and declares that in the border line cases the question frequently resolves itself into one of opinion as to wisdom and expediency rather than a question of law in the strict sense. Courts must be exceedingly cautious not to usurp the functions of the legislature in these cases and must accord deference to the legislative judgment in all cases of doubt. Public purpose in the law of taxation is a term which expands with the progress of civilization. To define it only in terms of custom and usage would mean complete stagnation in the law. Purposes which were not regarded as public in years gone by have come to be recognized as proper objects of taxation now. It cannot be denied that the act in question contemplates the expenditure of public money for a purpose from which the state at large will reap substantial benefits. While opinions differ as to the legal propriety of these expenditures there is not sufficient doubt as to the public purpose of the proposed taxation to warrant the court in reversing the legislative determination upon that point.

A brief but vigorous dissenting opinion urged that the statute provided for the levying of taxes for a private purpose and that the majority opinion declaring the purpose public "stretched to the breaking point all fundamental ideas of what is meant by that term." Relying chiefly upon the well known case of Lowell v. Boston, 111 Mass. 454, the dissenting justices concluded that no public purpose was served "by this attractive bit of paternalistic legislation."